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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW JASON SAXON,

Defendant and Appellant.

A150351

(Napa County
Super. Ct. No. CR179714)

Defendant Andrew Jason Saxon pled no contest to one count of corporal injury to someone with whom he had, or previously had, a dating relationship (Pen. Code,¹ § 273.5, subd. (a)), and admitted a great bodily injury enhancement (§ 12022.7, subd. (e)). The trial court sentenced Saxon to five years in prison. Saxon appeals, arguing the trial court abused its discretion when it denied him probation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After Saxon entered his plea in this case, the probation department prepared a pre-sentence report showing the following facts. The victim and Saxon dated for some time until August 2015, but stopped dating because of prior relationship violence. On May 9, 2016, officers contacted the victim, who had reported that Saxon kicked her in the face unexpectedly while visiting her home. Officers could see the victim had a bloody nose and a severely swollen right eye. When asked about the incident, Saxon claimed the victim attacked him by hitting him in the head with a glass candle and kicking him in the

¹ All further statutory references are to the Penal Code.

face. He claimed he merely pushed her off him in self-defense and denied hitting or kicking her or knowing how she got a swollen eye. Officers found no signs of injury on Saxon. Later, officers saw the victim at the hospital. They observed that one of her eyes was swollen to the size of a golf ball and completely shut, and that she had a chipped tooth. Medical staff informed the officers the victim had a fractured nasal bone, a chipped tooth, a traumatic contusion to her right pre-orbital region, a facial contusion, and facial fractures. The victim underwent facial reconstructive surgery due to the injuries she suffered.

The victim provided a statement for the probation report. Among other things, she relayed that she and Saxon had previously dated but stopped because he was violent towards her. The victim was “terrified” of Saxon getting out of custody and believed he would “do everything he [could] to get back to me and find me.” The victim believed Saxon deserved a prison sentence. She asserted that her medical bills amounted to over \$200,000, and that she might need additional surgery to repair the damage Saxon caused.

Saxon provided an oral statement for the probation report. He maintained the victim initiated the attack by hitting him with a candle. Saxon denied kicking her in the face but said he punched her in the face. He did not believe he hit her “that hard to cause that kind of damage to her face.” Saxon claimed he thought the victim had pre-existing injuries to her face. Saxon also provided a written letter for the court to consider at sentencing, asserting he has long suffered from a drug addiction.

The probation report indicated that Saxon was on summary probation at the time of his offense, and that he also violated a criminal protective order by trying to contact the victim in this case on May 31, 2016. The report discussed numerous criteria in rule 4.414 of the California Rules of Court,² which affect the decision to grant or deny probation, including the circumstances that: the instant crime was more serious than other instances of the same crime because the victim was seriously injured (rule 4.414(a)(1)); Saxon inflicted emotional and physical injury on the victim (rule

² All further rule references are to the California Rules of Court.

4.414(a)(4)); Saxon's prior performance on probation and present probation status was viewed as being poor (rule 4.414(b)(2)); despite Saxon's assurances that he is willing to comply with probation, he committed the instant offense while on summary probation, and he already violated the court's restraining orders by trying to contact the victim (rule 4.414(b)(3)); Saxon did not express remorse for his actions and said the victim had "pre-existing injuries" (rule 4.414(b)(7)); and Saxon presented an "extremely high" likelihood of being a danger to others if not imprisoned (rule 4.414(b)(8)).

Ultimately, the probation report recommended the trial court suspend proceedings and commit Saxon to the Department of Corrections for evaluation pursuant to section 1203.03, in order to give the probation department and the court more information about the sentencing choice. The trial court followed this recommendation. Ultimately, the Department of Corrections submitted a diagnostic study and a psychological report accompanied by a cover letter from the associate warden at San Quentin who recommended a prison commitment for Saxon. After receiving the information from the Department of Corrections, the probation department submitted a supplemental report recommending the denial of probation.

At sentencing, defense counsel requested the trial court place Saxon on probation. Counsel argued that Saxon had successfully completed probation in another county in 1998, that he was willing and able to comply with any terms of probation imposed, and that prison would impair Saxon's ability to function in society. The prosecutor sought a five-year term: the low term of two years for the section 273.5 count, plus the low term of three years for the section 12022.7 enhancement.

The trial court denied probation, noting the extent of the victim's injuries, Saxon's probation status at the time of the offense, and information suggesting Saxon failed and was unwilling to follow the court's orders. The trial court then imposed a five-year prison term.

DISCUSSION

Saxon contends the trial court abused its discretion by failing to consider various criteria set out in rule 4.414(b) when it denied him probation. More specifically, Saxon alleges the trial court did not consider his past performance on probation as required by rule 4.414(b)(2); his willingness to follow court orders as required by rule 4.414 (b)(3); his remorse as required by rule 4.414(b)(7); or the likelihood that if not imprisoned he would pose a danger to others as required by rule 4.414(b)(8). With regard to these criteria, he points to evidence that he successfully completed a term of probation in 1998; that he committed no misconduct for the duration of his stay at San Quentin while being evaluated; that he expressed remorse as stated in the Department of Corrections's psychological report; and that the Department of Corrections's diagnostic report did not say he would be a danger if granted probation. The People counter by arguing Saxon's forfeiture of this claim and its lack of merit. We agree with the People on both points.

“ ‘A party in a criminal case may not, on appeal, raise “claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices” if the party did not object to the sentence at trial.’ ” (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1100.) “[A] defendant cannot remain mute while the trial court states its reasons for imposing a sentence and then on appeal claim that its statement of reasons was defective.” (*Id.* at p. 1101.) “ ‘The reason for [the forfeiture] rule is that “[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.” [Citations.] “[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.” ’ ” (*Ibid.*)

Here, Saxon does what the foregoing decisional authority proscribes. Although he complains the trial court failed to consider various criteria set out in rule 4.414(b) and evidence pertaining to those criteria, he remained mute when the trial court denied probation without explicitly addressing the criteria and evidence he now complains were ignored. There is nothing in the record indicating that defense counsel could not have

asked the trial court to expressly address each of the criteria and the evidence Saxon presently relies on, or that the trial court would have refused to address them despite such a request.

Even had the issue been properly preserved, we find no abuse of discretion. Saxon contends the trial court failed to consider various criteria set out in rule 4.414(b). Notably, rule 4.409 provides that relevant factors are “*deemed to have been considered* unless the record affirmatively shows otherwise.” (Italics added.) Saxon fails to discuss or counter rule 4.409’s application here. In any event, nothing in the record affirmatively supports a conclusion that the trial court did not consider all of the factors identified in rule 4.414. To the contrary, the record indicates the trial court considered the probation reports and the Department of Corrections’s diagnostic study and psychological report, and heard from those who spoke during the sentencing hearing, including defense counsel and the prosecutor. All of these sources discussed facts relevant to the various rule 4.414 criteria, and the record contains no suggestion that the court rejected the information from these sources as irrelevant to the matter.

Saxon next argues the trial court could not rely on the Department of Corrections’s diagnostic study or psychological report because the diagnostic study recommended the court impose a prison term, while the psychological report did not reach the same conclusion. This claim was forfeited because it was not raised below. In any case, the claim lacks merit. The record reflects the diagnostic study recommended Saxon’s imprisonment, and the psychological report did not reach a conclusion contrary to that study. The psychological report discussed Saxon’s background, substance abuse history, criminal history, the circumstances of the offense, and the concerns the evaluator had about Saxon’s potential release into the community. Notably, the author of the psychological report did not opine one way or the other on the appropriateness of probation. Rather, the author of the report only focused on recommendations that would be relevant if the trial court were to permit Saxon’s release on probation.

Finally, Saxon claims the trial court abused its discretion in denying probation, because “the probation report contained a description of injuries that were unsupported

by any evidence other than a statement in the probation report” and the “only verifiable injuries . . . were in the photographs of a prior incident admitted over defense objection.” (Italics omitted.)

This claim also was forfeited. Defendant objected when the prosecutor provided the trial court photographs of a 2015 attack on the same victim by Saxon, but defendant never raised the specific contention made here; nor did he ever object to the consideration of the probation report. (See *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 725.) Additionally, Saxon’s reliance on *People v. Eckley* (2004) 123 Cal.App.4th 1072 (*Eckley*) in which a sentencing decision was reversed because of inaccuracies in several sentencing documents, is misplaced. (*Id.* at pp. 1078–1081.) In *Eckley*, information in the probation report contained statements that were unsupported or even contradicted by the trial evidence. (*Id.* at pp. 1078–1079.) There, the defendant objected to the inaccuracies in the sentencing documents before the sentencing hearing. (*Id.* at p. 1077.) Here, in contrast, Saxon made no objection to the probation report, and there is nothing in the record indicating the falsity of any of the information in the probation report concerning the victim’s injuries.

For all the foregoing reasons, we conclude the trial court did not abuse its discretion in denying Saxon probation.

DISPOSITION

The judgment is affirmed.

Fujisaki, J.

We concur:

Siggins, P.J.

Jenkins, J.

A150351